In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. ~~72~~-606

THE STATE OF OKLAHOMA,
Petitioner,

VERSUS

ARCHIE L. MASON and MARGARET R. MASON, Administrators of the Estate of Rose Mason, Osage Allottee No. 327, a Deceased Restricted Osage Indian, and THE UNITED STATES,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

LARRY DERRYBERRY
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105

PAUL C. DUNCAN
Assistant Attorney General
Chief, Civil Division
112 State Capitol Building
Oklahoma City, Oklahoma 73105

Counsel for Petitioners

October, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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Petitioner, State of Oklahoma, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above captioned case on June 16, 1972, in Cause No. 417-70 in that Court.

CITATIONS TO OPINION BELOW

The United States Court of Claims' written opinion is reported at 461 F.2d 1364 (1972). A copy of the decision of the United States Court of Claims is contained in the appendices to this petition.

JURISDICTION

The judgment of the United States Court of Claims was entered on June 16, 1972. On the 12th day of September, 1972, Mr. Justice White granted petitioner's application for additional time in which to file his petition for writ of certiorari to October 16, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1225.

QUESTIONS PRESENTED

1. Is an inferior court bound to follow a decision of the United States Supreme Court directly in point if it believes the law to have changed?

2. If the United States breached its fiduciary relationship with the Osage Indians by failing to bring a lawsuit to test the applicability of the existing United States Supreme Court decision, does the United States Government's failure to bring such a lawsuit create liability on the State of Oklahoma?

3. May the State of Oklahoma be held liable retrospectively for following a United States Supreme Court decision directly in point?

4. Is the law set forth in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948), governing the payment of estate tax on the estates of the deceased incompetent Osage Indians still controlling?

STATEMENT OF THE CASE

On November 20, 1970, an original action against the United States was brought in the United States Court of Claims by Archie L. Mason and Margaret R. Mason, Administrators of the Estate of Rose Mason, Osage Allottee No. 327, a deceased restricted Osage Indian. The action against the United States is maintained on an alleged breach of fiduciary relationship created by the Osage Allotment Act of 1906, 34 Stat. 539 (often amended).

The Osage Allotment Act, *supra*, divided tribal lands and funds equally among 2,229 tribal members thereby creating "headrights," a term used to describe each of the fractional shares of the distributable income from the minerals together with a reversionary title to a like share of minerals whenever the mineral trust terminates. Under this Act, royalties resulting from the mineral production is placed in the United States Treasury and credited to individual members of the tribe. Although this trust was initially created for a period of 25 years, by statutory amendment, the trust period has been extended to 1983 (52 Stat. 1034, §3). During the period of the trust, legal title to the minerals is in the United States as trustee, but thereafter will vest absolutely in the allottees or their heirs (Section 2(7) and Section 5 of the Act, *supra*).

The Osage Allotment Act, *supra*, further provided for the issuance by the Secretary of Interior certificates of competency to adult Osages who were "fully competent and capable of transacting his or her own business and caring for his or her own individual affairs."

Rose Mason was an Osage Indian living in Oklahoma who never received a competency certificate. Therefore, the United States held in trust certain of her property. On the death of Rose Mason, the United States through the Osage Agency prepared, signed and filed an Oklahoma estate tax return, including therein as part of the corpus of the estate, property held in trust by the United States. In accordance with the estate tax return, payments were made in September of 1967 and December of 1968 to the Oklahoma Tax Commission, of estate taxes from the trust fund of Rose Mason held by the United States. The levy of such tax by the State of Oklahoma and payment thereunder by the United States was based on the United States Supreme Court decision in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948) (Appendix B), which until the present case has been the only expression by this Court of the propriety in levying and collecting such a tax from the Osage.

Archie L. Mason and Margaret R. Mason were appointed co-administrators of the estate of Rose Mason by the County Court of Osage County, Oklahoma, and were subsequently discharged as co-administrators in May of 1968. It is admitted that as administrators, Archie L. Mason and Margaret R. Mason did not participate in the filing of the estate tax return, or the payment of the estate taxes. In November of 1970, the District Court of Osage County allowed the estate of Rose Mason to be reopened, and thereafter reappointed Archie L. Mason and Margaret R. Mason as co-administrators for the specific purpose of instituting a lawsuit to determine if the estate taxes had been erroneously paid.

Thereafter an action was maintained in the United States Court of Claims against the United States for a breach of fiduciary relationship in the payment of the Oklahoma estate tax. The State of Oklahoma was impleaded as a third party defendant by the United States, and the United States sought a judgment against the State of Oklahoma in an amount equal to the judgment, if any, which might be obtained against the United States by the administrators.

The case was argued in the United States Court of Claims, and was decided by that Court on June 16, 1972 (Appendix A). By its decision, the United States Court of Claims ruled that *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948), does not represent the current state of the law, and that the United States breached its fiduciary relationship in paying the estate tax levied by the State of Oklahoma and was liable for such payment. In turn, the State of Oklahoma was found to be liable to the United States for the full amount of the judgment against it, *Mason* v. *U. S.*, 461 F.2d 1364, 1379 (1972), (Appendix A-25).

It is from this decision of the United States Court of Claims that petitioner seeks review by the Supreme Court.

REASONS FOR GRANTING THE WRIT

I

Substantial rights of many private citizens and governmental entities are dependent upon a definitive statement by this Court as to the ability of the State of Oklahoma to collect the estate tax in question. With the advent of the *Mason* v. *U. S.*, 461 F.2d 1364 (1972), decision by the United States Court of Claims, an irreconcilable conflict exists upon an identical fact situation between that Court in *Mason* and the United States Supreme Court in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948). Although the petitioner feels strongly that the *West* decision still controls, future payment of estate taxes will not be made by the United States in light of *Mason*, and indeed such payments are currently being withheld by the United States pending this Court's ultimate decision. Further, following the *Mason* decision, a class action was instituted on July 11, 1972, in the United States Court of Claims, styled *Wilson, et al.* v. *U. S.*, Court of Claims No. 285-72, for recovery on behalf of all "heirs, beneficiaries, and personal representatives of deceased restricted Osage Indians whose estates were reduced by the wrongful payment by the defendant of Oklahoma estate taxes." This action seeks recovery for over 300 members of the class, and does not appear to be limited to any point in time. In that action, the State of Oklahoma has again been made a third party defendant and will be held ultimately liable by the Court of Claims under its ruling in *Mason* unless relief is granted by this Court.

Additionally, on July 14, 1972, the United States filed an action in the United States District Court for the West-

ern District of Oklahoma against the State of Oklahoma (*U. S.* v. *State of Oklahoma,* Court No. CIV-72-493), in which it seeks the following recovery:

> "1. The State of Oklahoma make an accounting to the United States as to all inheritance type taxes paid to it by the United States over the years that fall within the terms of the decision of the United States Court of Claims in *Mason* v. *United States;*
>
> "2. The State of Oklahoma pay over to the United States all such taxes erroneously paid, plus such interest as the Court determines proper; and
>
> "3. For such other and further relief as the Court may deem just."

The United States bases this action on the Court of Claims' decision in *Mason* and seeks recovery "over the years that fall within the terms of the decision." It appears that the United States may, like the petitioner, have difficulty in determining the period of time which *Mason* purports to cover, as they did not specify a time period within their complaint. It has been agreed by the parties in this case, that no action will be taken until such time as the Supreme Court has had an opportunity to review the *Mason* decision.

For this petitioner, although it is felt that the law set forth in *West* v. *Oklahoma Tax Commission,* 334 U.S. 717 (1948), is still controlling, the gravamen of the issue is not a possible overturning of *West* by the United States Supreme Court which would be applied prospectively. It is of great concern to petitioner that under the apparent ruling in *Mason* v. *U. S.,* 461 F.2d 1364 (1972), petitioner might be ultimately liable for an unspecified period of time as a result of the breach of fiduciary duty over which petitioner had no control.

II

From the outset, it is agreed by the parties and recognized by the Court that the factual situation existing in the instant case is identical to that in *West*.

> "Five years later, this holding was applied to the *very type of trust property now before us*—Osage headrights (and funds derived therefrom) and shares of Osage trust fund (derived from the Kansas lands) held in trust by the United States for the Indians. *West* v. *Oklahoma Tax Commission, supra*, 334 U.S. 717 (1948). . . ." *Mason* v. *U. S.*, 461 F.2d 1364, 1370 (1972). (Appendix A-8-9). (Emphasis added.)

The Court of Claims after recognizing the identity of factual relationship between *Mason* and *West*, then agrees with petitioner's position that the last word from the Supreme Court interpreting the question raised today is contained in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948) (Appendix B). The Court of Claims stated in *Mason*:

> "The *West* opinion is the last word from the Supreme Court *directly on point*, but it is not the last word on Indian tax immunity." *Mason* v. *U. S.*, 461 F.2d 1364, 1370 (1972). (Appendix A-9). (Emphasis added.)

After recognizing the import of the *West* decision to the identical fact situation, the only way in which the Court of Claims could arrive at its decision in *Mason* was to deny the integrity of *West* since it was impossible to distinguish it away on the basis of the facts in *Mason*. The Court indicated an understanding of the problems in an inferior court overruling a United States Supreme Court

decision, but once recognizing the problem, the Court proceeded to do just that.

> "Appraisal of the applicability of the tax necessarily thrusts us into an inquiry of the current status of *West* v. *Oklahoma Tax Commission*, supra, 334 U.S. 717 (1948). For an inferior tribunal this is a most delicate undertaking. *It goes without saying that we cannot refuse or fail to follow a Supreme Court decision, directly in point, because we disagree with its reasoning or think it erroneous.* But our responsibility differs where there have been significant developments—in the Supreme Court itself, in the lower courts, and in relevant administrative practice—showing that the underpinnings of the highest court decision have been seriously weakened or eroded." *Mason* v. *U. S.*, 461 F.2d 1364, 1374 (1972). (Appendix A-17-18). (Emphasis added.)

In a decision in *McCorkle* v. *First Pennsylvania Banking & Trust Company*, 459 F.2d 243 (1972), the Fourth Circuit Court of Appeals addressed itself to a similar problem as indicated by the Court of Claims in *Mason*. In *McCorkle* the Court stated:

> "It would be sheer presumption for an inferior tribunal to undertake to overrule an explicit decision in the Supreme Court from which the court has given no hint of departing, no matter what may be thought of the wisdom of that decision. It is a function of the Supreme Court to correct our errors; it is not our function to rectify what we may consider mistakes of the Supreme Court." *McCorkle* v. *First Pennsylvania Banking & Trust Company*, 459 F.2d 243, 249 (1972).

In writing his dissenting opinion in *Mason*, Judge Skelton succinctly stated the problem in the majority's reasoning:

> "I think the majority has fallen into error in refusing to follow the decision of the Supreme Court in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717, 68 S.Ct. 1223, 92 L.Ed. 1676 (1948), which it admits involves the identical problem we have in the instant case and is the only decision of that court that has ever decided the exact question we have before us. That case has never been overruled and the law under which it was decided has not been changed. Consequently, we are required to follow it." *Mason* v. *U. S.*, 461 F.2d 1364, 1379 (1972). (Appendix A-26).

Properly, the Court of Claims might have been sympathetic with the position of the Osage in the *Mason* case. However, the Court's personal feelings notwithstanding, it cannot be more than mere conjecture or speculation as to what the Supreme Court would do if again faced with the question presented in *West*. As previously indicated, the Court of Claims relied heavily upon what it considers a significant development in the Supreme Court itself, which must only be the decision of *Squire* v. *Capoeman*, 351 U.S. 1 (1956).

While not elaborating here on the apparent distinctions between *Squire* and *West* (See part IV of petition, p. 16), it should be noted that although the Court of Claims felt that *Squire* was a significant development in the Supreme Court, no effort was made to explain why the Supreme Court in deciding *Squire* made no reference to the *West decision*. To assume that *Squire* either directly or indirectly was contemplated by the Supreme Court to

affect the *West* decision, is to permit conjecture not substantiated by the case holding.

Next, the Court of Claims states that developments in the lower courts or in relevant administration practice weakened or eroded the underpinnings of the Supreme Court decision in *West* (See page 9, *supra*). This concept is difficult to understand. How can an inferior court by any action weaken a decision of the Supreme Court? If the Court of Claims is correct in this interpretation, it requires each fiduciary to become immediately aware of all lower court decisions which seem in any way contrary to a holding of the United States Supreme Court and places a possible legal liability upon a fiduciary who fails to continually test to determine what the law might become as the result of the lower court rulings. One can feel no safety in reliance on what the Supreme Court has stated the law to be.

In making its ruling in *Mason*, the United States Court of Claims has shifted the burden of perfecting an appeal to question an existing United States Supreme Court decision from those seeking relief and a change of such decision to those who in the past in good faith relied upon it. Certainly had the Court of Claims ruled that it could not overturn the decision of the Supreme Court in *West*, it would not have foreclosed the Osage from seeking relief in the Supreme Court. Instead, it is now up to this petitioner to justify its action throughout the years since *West* and in effect have the burden of going forward and relitigating the past decision. If this is allowed by the Supreme Court, there seems nothing to prevent the Court of Claims at some time in the future again deciding that the law of

West is improper and again forcing this petitioner or the United States to assume an unjust burden of appealing.

It is interesting to note that by *Mason,* the Court of Claims may have placed additional burden upon the Supreme Court to in effect review its own decision. Had the lower decision originally been in favor of the United States and the State of Oklahoma, it would have been incumbent upon the Osage to perfect its appeal if relief was sought. The Supreme Court could have under those circumstances found *West* to be current law and denied certiorari. If the law should be changed, the Supreme Court could accept jurisdiction and properly overturn the *West* decision.

However, under the present circumstances, for the Supreme Court to deny certiorari to this petitioner requesting a review of the lower decision, leaves the law in a state of quandary. Now, not only must the Supreme Court take jurisdiction if it wishes to overturn the *West* decision as before (certainly *West* must be considered the law irrespective of the lower court decision or else the parties could change the law by merely refusing to appeal such decision) it must additionally take jurisdiction if it wishes to affirm its prior ruling in *West.* It would seem that this is an improper posture for the Supreme Court to be placed by an inferior tribunal.

To allow a Court of Claims to overrule the long-standing precedent of the Supreme Court in the *West* decision in this manner is to abdicate by the Supreme Court its power granted under Article III, §1 of the United States Constitution.

III

In order to hold ultimately against this petitioner, it was necessary for the Court of Claims to determine that the United States breached its fiduciary duty to the Osage Indian, presumably by failing to bring a lawsuit to test the *West* decision in light of "other developments" which the Court of Claims deems significant. Petitioner urges that the United States did not breach its fiduciary duty to the Osage, but that even if that were the case, it should not create liability on the State of Oklahoma.

The Court of Claims apparently feels that the United States should have brought an action to test *West*, but does not specify when such an action should have been brought. (The point of time in which such action should have been brought must of necessity under the *Mason* rule be the time at which the United States breached its fiduciary relationship and thereby created liability on both itself and the petitioner, State of Oklahoma.) The Court stated:

> ". . . For we are satisfied that, by 1967 and 1968 when the tax was handed over, the shadows on that decision (West) loom so large that the Government, as fiduciary with the obligation to protect the Indian, should have tested the current acceptability of *West* by challenging collection of the tax. . . ." *Mason* v. *U. S.*, 461 F.2d 1364, 1372 (1972). (Appendix A-13.)

The shadow which the Court refers to consists of *Squire* v. *Capoeman*, 351 U.S. 1 (1956), two cases decided by the Court of Claims, *Big Eagle* v. *United States*, 300 F.2d 765 (1962), *Beartrack* v. *United States*, Ct. Cl. No. 281-67 (1967) (a case settled by the United States on October 25, 1968), and an internal revenue ruling handed down

after the payment of this tax in question on April 7, 1969, in Rev. Rul. 69-164. It is to be pointed out that only one of the decisions, *Squire,* was made by the Supreme Court, and from reading that decision, no attempt was made to change *West.* After recitation of these cases, the Court of Claims stated:

> "From all this, the Department of Interior would have to conclude, in our view, that there was at the very least a serious question whether *West* remains viable and that, as a fiduciary for Rose Mason and her estate, the United States would have to test that issue by protesting the payment of the tax and litigating its applicability." (By footnote, the Court pointed out that the federal government brought a suit to recover the inheritance taxes imposed by Oklahoma in *Oklahoma Tax Commission* v. *United States,* 319 U.S. 598.) *Mason* v. *U. S.,* 461 F.2d 1364, 1372). (Appendix A-14).

Once deciding that the United States did in fact breach its fiduciary relationship with the Osage Indian by not refusing to pay to the State of Oklahoma the estate tax or otherwise testing the *West* decision, the Court holds the State of Oklahoma liable to the United States.

> "If, as we have just held, the Oklahoma estate tax should not have been paid or collected with respect to this Indian trust and restricted property, the State is liable over to the United States, which, as trustee, improperly paid the tax. As trustee, the United States can sue for return of the money." *Mason* v. *U. S.,* 461 F.2d 1364, 1379 (1972). (Appendix A-25).

In support of this holding, the Court of Claims cites a United States Supreme Court decision of *Poafpybitty* v. *Skelly Oil Company,* 390 U.S. 365, 369-70 (1968). Unquestionably, *Poafpybitty* stands for the proposition that the

United States can sue for return of money where it is trustee as well as allowing the Indians to maintain an action on their own. However, this case did not turn on the United States having breached a fiduciary relationship nor does it discuss this question. It is contended by petitioner that the United States could have at any time, instituted an action on behalf of the Indian questioning the *West* decision as the Court of Claims thought it should. However, had this been done, and had the United States successfully overturned the *West* decision, there would have been a specific determination that Oklahoma could no longer collect the estate tax from that point in time forward. No serious argument can be made that Oklahoma would have to repay any estate tax collected from the time of the *West* decision until its overturning by the Supreme Court.

The Court of Claims seems to find by failing to specify when the United States breached its fiduciary relationship yet allowing it total recovery against the State of Oklahoma, that the State of Oklahoma can be held liable for the negligence of the United States resulting in its breach of fiduciary relationship with the Osage Indian, and in fact places Oklahoma in the position of being a fiduciary for the benefit of the Osage Indian. For the Court of Claims to make this holding completely exonerates the United States for its wrongdoing (as determined by the Court of Claims), and places the burden totally upon the State of Oklahoma. Although the United States was a party and had knowledge to the decisions which the Court of Claims says "cast shadows" on *West*, Oklahoma was not a party and perfectly entitled to rely on the *West* decision. How then, may the

State of Oklahoma be held liable retrospectively for following a United States Supreme Court decision directly in point?

If the Court of Claims is correct, from what point is the State of Oklahoma liable? Is it the time when the *Squire* case was handed down in 1956 or should the State of Oklahoma have insisted the United States sue it after a 1969 internal revenue ruling? At all times that the State of Oklahoma collected the estate tax from the Osage Indian, it did so under the authorization and therefore protection of the United States Supreme Court decision. To allow an inferior court to strip away this protection for an unspecified period of time and place no monetary responsibility on the fiduciary (which the Court found to have been wrong) should not be upheld by the Supreme Court.

IV

To determine whether *West* v. *Oklahoma Tax Commission, supra,* is presently good law, careful attention will be given to *Squire* v. *Capoeman,* 351 U.S. 1 (1956), as being the only Supreme Court case cited by the United States Court of Claims in the *Mason* decision. Mr. Chief Justice Warren, in delivering the opinion of the Court in *Squire,* stated:

> "The question presented is whether the proceeds of the sale by the United States Government of standing timber on allotted lands on the Quinaielt Indian Reservation may be made subject to capital-gains tax, consistently with applicable treaty and statutory provision and the government's role as respondents, trustee and guardian." *Squire* v. *Capoeman,* 351 U.S. 1, 2 (1956).

In *Squire, supra,* the respondents were noncompetent Quinaielt Indians, born on the reservation. Pursuant to the General Allotment Act of 1887 the respondents were allotted 93.25 acres of reservation and received a trust patent. The land in question was described as forest land covered with trees in excess of 100 years old and not adaptable to agricultural purposes. It was further admitted that the land would have little value after the timber was cut.

In 1943, the Department of the Interior contracted for the sale of the timber on respondents' land and a long-term capital-gains tax was levied upon the sum received. In refusing to allow the imposition of such a tax, the Supreme Court quoted with approval an opinion of an Attorney General as follows:

> ". . . In other words, it is not likely to be assumed that Congress intended to tax the ward for the benefit of the guardian. [footnote omitted]." *Squire* v. *Capoeman,* 351 U.S. 1, 8 (1956).

The Court further stated:

> ". . . Respondents' timber constitutes the major value of his allotted land. *The government determines the conditions under which the cutting is made.* Once logged off, the land is of little value. The land no longer serves the purpose for which it was by treaty set aside to his ancestors, and for which it was allotted to him. It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence." *Squire* v. *Capoeman,* 351 U.S. 1, 10 (1956). (Emphasis added.)

Squire v. *Capoeman, supra,* differs markedly on its facts and the law applied and is readily distinguishable

from the *West* decision. As Judge Skelton pointed out in his dissenting opinion in *Mason*:

> "In that case (*Squire*), the court was dealing with a *direct tax* on the property of a *living noncompetent* Indian and no inheritance tax imposed by a state was involved. Furthermore, the tax would be imposed on the property of the wards by their guardian during their lifetime. No such facts exist in *West* nor do they exist in our case." *Mason* v. *U. S.*, 461 F.2d 1364, 1380 (1972). (Appendix A-28). (Emphasis added.)

Squire, supra, involves a direct tax, levied by the guardian on his ward, during the ward's lifetime, on property over which the guardian had total control (including at what time sale is to be made), and after a sale leaves for all practical purposes valueless that which remains for the benefit of the Indian. In the present case as in *West* an estate tax was levied by the State after the noncompetent Indian is deceased. This does not defeat the principle of *Squire,* in attempting to preserve for that noncompetent Indian as much of his allotment as possible. There is nothing to show that the heirs of *Mason* were themselves noncompetent Indians and entitled to the consideration set forth in *Squire.* Finally, in *Squire,* the guardian had total control over the advent of the tax consequence, whereas in the present case the State exercises no such control. It seems clear that both in fact and rationale the *Squire* case is distinguishable from the decision in *West,* and therefore the principles of *West* are still the law to be followed.

CONCLUSION

Substantial rights of many private citizens and governmental entities are dependent upon this Court's resolving the conflict created by the United States Court of Claims' decision in *Mason* v. *U. S.*, 461 F.2d 1364 (1972), which is in direct conflict with the United States Supreme Court decision in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948). As the result of *Mason*, not only is the State of Oklahoma effectively barred from collecting estate tax authorized under the Supreme Court decision, but additionally extensive litigation has been filed in the lower courts attempting to receive a refund for past taxes paid.

If the Supreme Court does not grant certiorari and review the actions of the Court of Claims in *Mason* v. *U. S.*, 461 F.2d 1364 (1972), then not only is the law with respect to estate taxes of restricted Osage Indians unclear, the Court would appear to be giving tacit approval to an inferior court's speculation as to changes which might come about if the Supreme Court reviews its decision.

If *Mason* is not reviewed by the Supreme Court, then the State of Oklahoma may be subjected to liability, to the same extent as a fiduciary, when it had no control over the situation giving rise to that liability. Furthermore, it appears that this liability may be for an undetermined amount of time as it is at least difficult to determine when the Court of Claims contemplated the United States breached its fiduciary duty to the Osage Indian. Furthermore, *Squire* v. *Capoeman*, 351 U.S. 1 (1956), does not change the rule of law announced in *West*, and that being the only United States Supreme Court decision cited by

the Court of Claims in deciding *Mason*, the *West* case must still be considered the law.

Petitioner contends that the actions of the United States Court of Claims in holding as it did in *Mason*, creates a conflict between its holding and that of the Supreme Court in *West* v. *Oklahoma Tax Commission, supra.*

WHEREFORE, premises considered, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above captioned case on June 16, 1972, in Cause No. 417-70 in that Court.

Respectfully submitted,

LARRY DERRYBERRY
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105

PAUL C. DUNCAN
Assistant Attorney General
Chief, Civil Division
112 State Capitol Building
Oklahoma City, Oklahoma 73105

Counsel for Petitioners

October, 1972

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS
No. 417-70

(Decided June 16, 1972)

ARCHIE L. MASON AND MARGARET R. MASON, ADMINISTRATORS OF THE ESTATE OF ROSE MASON, OSAGE ALLOTTEE #327, A DECEASED RESTRICTED OSAGE INDIAN v. THE UNITED STATES

THE UNITED STATES v. STATE OF OKLAHOMA, THIRD PARTY DEFENDANT

Charles A. Hobbs for plaintiffs. *Pierre J. LaForce, Wilkinson, Cragun & Barker* and *Files, Mahan & Wilson,* of counsel.

David W. Miller, with whom was *Assistant Attorney General Kent Frizzell,* for defendant.

Paul C. Duncan, Assistant Attorney General, State of Oklahoma, for third party defendant.

Before COWEN, *Chief Judge,* DURFEE, *Senior Judge,* DAVIS, SKELTON, NICHOLS, and KUNZIG, *Judges.*

ON DEFENDANT'S MOTION AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS, *Judge,* delivered the opinion of the court:

This case presents the sensitive problem of whether we should continue to follow a ruling of the Supreme Court

which is said no longer to be good law. The decision is *West* v. *Oklahoma Tax Comm'n*, 334 U.S. 717 (1948), upholding the right of Oklahoma to levy its estate tax on certain trust property of restricted Osage Indians. Officials of the Bureau of Indian Affairs paid the tax on behalf of, and out of the estate of, a restricted Osage, and her administrators now claim that in doing so the Federal Government breached its fiduciary obligation and is therefore liable for the amount of the tax. The United States has impleaded Oklahoma and, if ruled responsible, seeks judgment over. We hold for plaintiffs against the Federal Government, and for the latter against the state.

Better to explain why we consider the two governments liable, we shall follow a somewhat winding path to the end: first, setting out the general nature of the property involved (Part I, *infra*); then, the particular facts of the case (Part II); third, disposing of defendant's preliminary objections to reaching the merits (Part III); next, setting forth the history of the taxation, both federal and state, of Osage restricted property (Part IV); fifth, discussing the Government's fiduciary obligation with respect to payment of the Oklahoma estate tax (Part V); then, the present status of the *West* decision, *supra* (Part VI); and, finally, the liability of Oklahoma (Part VII). The first four sections will be the necessary ramble through the lower reaches of the mountain while the last three will be the stiffer climb to the peak.

I.

Osage restricted property

The General Allotment Act of 1887, 25 U.S.C. § 331, empowered the President to allot reservation land to the Indians covered by the statute; the allotment was to remain in trust until the Indian was declared capable of managing it, when it would be turned over "free of all charge or incumbrance whatsoever." The Osages were omitted from this 1887 statute but were finally given their own allot-

ments by the Osage Allotment Act of 1906, 34 Stat. 539 (often amended).

Previously, "the Osage reservation was held by the United States in trust for the Osage tribe. By the [1906] act, the tribal lands and funds were equally divided among the 2,229 tribal members. The lands were surveyed and allotted directly to individuals and the minerals were evenly divided through the provision for 'headrights', which is the term used to describe a right to 1/2229th share of the distributable income from the minerals, plus a reversionary title to a like share of the minerals whenever the mineral trust terminates. The act provided that the royalties derived from the extraction of the minerals be placed in the United States Treasury and held in trust for a period of 25 years to the credit of the individual members of the tribe, subject to periodic distributions. By statutory amendment the trust period has been extended to 1983 (52 Stat. 1034, section 3). While the trust exists, legal title to the minerals is in the United States as trustee, but thereafter the minerals will vest absolutely in the allottees or their heirs. See section 2(7) and section 5 of the act, *supra*. These basic arrangements have not been changed in any of the 12 amendments to the act between 1906 and 1957." *Big Eagle* v. *United States*, 156 Ct. Cl. 665, 667-68, 300 F. 2d 765, 765-66 (1962) (footnote omitted). See, also, *West* v. *Oklahoma Tax Comm'n*, *supra*, 334 U.S. 717, 719-23 (1948).

Tribal funds from the sale of tribal lands in Kansas were also divided equally by the 1906 act, which set up a Segregated Trust Fund for the 2,229 allottees in the sum of $3,819.76 each. Interest at 5% is to be paid until the trust ends in 1984, and the fund may be invaded by a non-competent Osage only with the approval of the Secretary of the Interior.[1]

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[1]The *West* opinion, *supra*, summarizes the status of all these trust properties (334 U.S. at 723): "Legal title to the mineral interests, the funds and the securities constituting the corpus of the trust estate is in

The 1906 statute likewise provided for issuance by the Secretary of certificates of competency to an adult Osage who was "fully competent and capable of transacting his or her own business and caring for his or her own individual affairs."

II.

This case

Rose Mason was an Osage living in Oklahoma who never received a competency certificate. For that reason the United States held in trust certain of her property, including headrights (described in Part I, *supra*), securities held in trust (derived from headrights), cash held in trust (derived from the trust fund described in Part I, *supra*), unpaid headrights payments (income from headrights), and surplus trust funds (derived from headrights).

On her death intestate, representatives of the Federal Government in the Osage Agency, under the usual practice, prepared, signed, and filed an Oklahoma estate tax return for her, including as part of the corpus of the estate the above items of trust property. In September 1967 and December 1968, the Osage Agency paid to the Oklahoma Tax Commission a total of $8,087.10 for state death taxes relating to the decedent. This payment was made out of trust funds of decedent held by the Government.

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[1] (Continued)

the United States as trustee. The United States received legal title to the mineral interests in 1883, when it took what is now Osage County from the Cherokees in trust for the Osages; and that title has not subsequently been transferred. Legal title to the various funds and securities adhered to the United States as the pertinent trusts were established and developed. Beneficial title to these properties was vested in the decedent and is now held by his sole heir, the appellant. The beneficiary at all times has been entitled to at least a limited amount of interest and royalties arising out of the corpus. And the beneficiary has a reversionary interest in the corpus, an interest that will materialize only when the legal title passes from the United States at the end of the trust period. But until that period ends, the beneficiary has no control over the corpus."

Plaintiffs are administrators of the estate of Rose Mason, appointed by the County Court of Osage County, Oklahoma.[2] They had nothing to do with the filing of the estate tax return, or the payment of the state taxes. They were discharged in May 1968, but in November 1970 the District Court of Osage County reopened the estate and reappointed plaintiffs "for the purpose of instituting such suit as may be proper to recover the estate taxes erroneously paid, together with interest thereon."

The result was the petition here, filed on November 20, 1970, alleging that the Federal Government breached its fiduciary duty in paying the Oklahoma estate tax on the trust properties described above. The United States impleaded the State of Oklahoma as third party defendant, asking for judgment against the state "equal to such judgment, if any, as may be entered on behalf of the plaintiffs against the United States."

Both the Federal Government and the plaintiffs have moved for summary judgment. The motion of the United States asks that, if plaintiffs prevail, there be recovery over against the state. Oklahoma has not moved for judgment, but it appeared and argued orally that the challenged tax was properly imposed on the trust property under *West* v. *Oklahoma Tax Comm'n, supra.*

III.

Defendant's preliminary objections

The United States interposes some preliminary reasons for dismissing the petition without reaching or even touching on the merits, but we reject those threshold defenses. One is that the plaintiffs, administrators of the estate, are not the proper parties to sue; Rose Mason's heirs are said to be the real parties in interest and indispensable suitors. The shortest answer is that under Rule 61(a) of our Rules the

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[2]State courts have probate jurisdiction of Osage estates under the Act of April 18, 1912, 37 Stat. 86.

plaintiffs may sue as duly authorized administrators on behalf of the estate, out of the funds of which the disputed tax was paid before distribution of the estate's assets to the heirs.

Another defense is that the claimants failed to exhaust their administrative remedies by omitting to appeal within the Bureau of Indian Affairs, under 25 CFR § 2.3 (1967), from the Osage Agency's payment of the tax.[3] It is unlikely that this §2.3 intended to cover as a "decision" the action of the Osage Agency in paying the tax; some more formal determination seems to have been contemplated since 25 CFR § 2.2 and 2.4 require such "decisions" to be put in writing and that notice be given to the affected Indian—and neither of these directives was fulfilled here. In any event, the administrative appeal is optional, not mandatory—the regulation says the affected Indian "may" appeal—and under the familiar principle does not preclude a court suit.

In its own motion for summary judgment (which was filed first), the defendant sought to reserve, as "factual matters" calling for further trial proceedings, its separate defense that plaintiffs are barred by their failure to object to the payment of the tax.[4] However, after the plaintiffs filed their motion for summary judgment the Government did not file any affidavits or indicate in any other way that there were further facts to be tried or found. We shall

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[3]This regulation provides:

"In accordance with the procedure in this part, any interested party adversely affected by a decision of an official under the supervision of an Area Director of the Bureau of Indian Affairs may appeal to the Area Director; an appeal may be taken to the Commissioner of Indian Affairs from a decision of the Area Director; and an appeal may be taken to the Secretary of the Interior from a decision of the Commissioner."

[4]These defenses averred that plaintiffs "are estopped by past conduct from now complaining of" the facts alleged in the petition, and specified the failure to object as well as the ruling of the County Court originally discharging the administrators and declaring that all taxes due and owing by the estate had been paid.

therefore assume that we now have all the facts upon which the defenses of estoppel and laches are based and dispose of them in connection with our discussion of the Government's fiduciary responsibility (Part V, *infra*).

IV.

The course of taxation of Osage restricted property

To understand our analysis of the obligation of the United States (Part V, *infra*) and of the current status of *West* v. *Oklahoma Tax Comm'n, supra* (Part VI, *infra*), it will help to begin by setting out, descriptively, the history of the taxation by the United States and the states of Osage (and comparable) Indian restricted property.

A. With regard to that type of asset, as we have indicated the Osage Allotment Act, as amended, places it in trust and goes on to say (as spelled out in the 1947 amendment, 61 Stat. 747):

> That the Osage lands and funds and any other property which has heretofore or which may hereafter be held in trust or under supervision of the United States for such Osage Indians not having a certificate of competency shall not be subject to lien, levy, attachment, or forced sale to satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency.

Earlier, the 1912 amendment, 37 Stat. 86, 88 had put it this way: "nor shall the lands or funds of Osage tribal members be subject to any claim against the same arising prior to grant a certificate of competency. That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs * * *."[5]

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[5]A brief history of the pertinent changes in the Osage Allotment Act is given at *Big Eagle* v. *United States, supra*, 156 Ct. Cl. 665, 672-73, 300 F. 2d 765, 768-69 (1962).

In 1929 and 1938, Congress amended the Act (45 Stat. 1478-79, 52 Stat. 1034, 1035) to direct that the restricted mineral lands "and all royalties and bonuses arising therefrom shall belong to the Osage Tribe of Indians and shall be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law * * *."

B. For many years Indian trust or restricted property was considered immune from state taxation on various theories, the last being that such properties were "federal instrumentalities" and therefore exempt by constitutional implication. See *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 602-04 (1943).[6] This reasoning was rejected by the Supreme Court in its *Oklahoma Tax Comm'n* opinion, *supra*, 319 U.S. 598, 603, which then went on to consider whether immunity flowed from the Congressional restrictions on alienability and use. The case involved inheritance taxes imposed by Oklahoma on the transfer of the estates of members of the Five Civilized Tribes who held legal title to their property; the estates included restricted cash and securities under the supervision of the Secretary of the Interior. The Court held "that the restriction, without more, is not the equivalent of a congressional grant of estate tax immunity for the cash and securities" (319 U.S. at 602), finding that "(1) the legislative history of the Act [imposing the restriction] refutes the contention that an exemption was intended; and (2) application of the normal rule against tax exemption by statutory implication prevents our reading such an implication into the Act" (319 U.S. at 604).

Five years later, this holding was applied to the very type of trust property now before us—Osage headrights (and funds derived therefrom) and shares of the Osage trust fund (derived from the Kansas lands) held in trust

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[6] At the same time, federal income and federal estate taxes seem to have been levied and collected with respect to much of this property (at least in the later years). See Part VI B, *infra*, and notes 8 and 13, *infra*.

by the United States for the Indians. *West* v. *Oklahoma Tax Comm'n, supra,* 334 U.S. 717 (1948). The Court "fail[ed] to see any substantial difference for estate tax purposes between restricted property and trust property. The power of Congress over both types of property is the same * * *. The effect which an estate or inheritance tax may have is the same in both instances; liens may be placed on both restricted and trust properties and lead to complications; and both types of property may of necessity be depleted to assure payment of the tax." 334 U.S. at 726. The Court refused to find any reason for immunity in the fact that the estate might "be tapped repeatedly by Oklahoma until 1984 [the end of the trust] by the deaths of the various heirs", and "the result may be a substantial decrease in the amount then available for distribution" 334 U.S. at 726, 727. The opinion also pointed out the distinction between estate or inheritance taxation and property taxes. "It is the transfer of these incidents [on death], rather than the trust properties themselves, that is the subject of the inheritance tax in question." 334 U.S. at 727. But the Court also noted that "should any of the properties transferred be exempted by Congress from direct taxation they cannot be included in the estate for inheritance tax purposes. No such properties are here involved, however." 334 U.S. at 727-28.

c. The *West* opinion is the last word from the Supreme Court directly on point, but it is not the last word on Indian tax immunity. *Squire* v. *Capoeman,* 351 U.S. 1 (1956), concerned the right of the Internal Revenue Service to impose the federal income tax (capital gain tax) on sale of standing timber on land of a Quinaielt Indian (in the State of Washington) held in trust for him by the United States under the General Allotment Act. The Court held that the tax could not be levied.[7] First, the opinion looked favorably on the Indian's argument that immunity was implied by

[7]The prior assumption by the Internal Revenue Service appears to have been that the tax could be imposed. See Part VI, *infra.*

the Government's promise (in the General Allotment Act) to transfer fee title to the land (at the end of the trust) "free of all charge or incumbrance whatsoever." But the Court did not place its holding solely on that ground (351 U.S. at 6-7). It relied more heavily on a provision of the Allotment Act that after award of a patent to the allottee in fee simple "all restrictions as to sale, incumbrance, or taxation of said land shall be removed * * *." This was said to imply that, before transfer, the allotted land was to be free of all taxes. 351 U.S. at 7-9. The "wisdom of the congressional exemption from tax" was manifested, the Court thought, by the fact that unless the full proceeds of the timber sale were preserved for the Indian allottee he would not have the necessary chance of survival when declared competent and the trust ended. 351 U.S. at 10.

D. A year after *Squire* v. *Capoeman*—a federal income tax case—the Ninth Circuit held, on its authority, that the trust allotment of a California Mission Indian was not subject to state inheritance taxes. *Kirkwood* v. *Arenas*, 243 F. 2d 863 (C.A. 9, 1957). Although the Mission Indian Act did not contain the provision (in the General Allotment Act) relating to "taxation" on which the Supreme Court had mainly rested, the *Arenas* opinion considered that the two statutes were in *pari materia* and that the *Squire* decision controlled. Alternatively, the court ruled that the declaration in the Mission Act that the fee was to be transferred "free of all charge or incumbrance whatsoever" was sufficient by itself under the *Squire* theory.

In 1962, in *Big Eagle* v. *United States*, 156 Ct. Cl. 665, 300 F. 2d 765, this court refused, relying on *Squire*, to permit the federal income tax to be applied to income derived from Osage trust properties of the exact type now before us. Like the *Arenas* case, *supra*, we read the Osage Allotment Act in the same spirit, as understood by *Squire*, as the General Allotment Act—even though the former differed in terms from the latter, omitting not only the "taxation"

provision but also the "free of any charge or incumbrance" language. 156 Ct. Cl. at 676-78, 300 F. 2d at 770-72. Our opinion emphasized, as equivalent to the latter declaration, the amendments to the Osage legislation directing that "*all* royalties and bonuses arising therefrom [the Osage mineral lands] * * * *shall* be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law * * *" [emphasis added], pointed out the similarities and common purpose of the General Allotment and Osage Allotment Acts; and added that Congress could have, but did not, specifically legislate to impose the income tax on income from noncompetent Osage headrights.[8]

In the same year, the Tenth Circuit applied *Squire* to Quapaw Indians (who, like the Osages, had their own allotment Act), excepting federal income tax gain from restricted Indian lands. *United States* v. *Hallam*, 304 F. 2d 620 (C.A. 10, 1962). The next year, *Nash* v. *Wiseman*, 227 F. Supp. 552 (W.D. Okla. 1963), extended *Squire* to federal estate taxes on trust property of an Indian subject to the General Allotment Act. To the same effect is *Asenap* v. *United States*, 283 F. Supp. 566 (W.D. Okla. 1968). See, also, *United States* v. *Daney*, 370 F. 2d 791 (C.A. 10, 1966) (mineral lease bonus immune from federal income tax although statute provided for taxation of the minerals themselves).

E. In 1969 the Internal Revenue Service ruled (Rev. Rul. 69-164, 1969-1 Cum. Bull 220) that Indian trust properties held under the General Allotment Act were free of the federal estate tax. This ruling expressly follows *Squire*. By a Technical Advice Memorandum, August 15, 1969, to the District Director of Internal Revenue in Oklahoma City,

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[8]In 1930, before *Oklahoma Tax Commission* and *West*, the Tenth Circuit had held such income immune. *Blackbird* v. *Comm'r*, 38 F. 2d 976, 977-78. The rationale of this decision was disapproved in *Superintendent* v. *Commissioner*, 295 U.S. 418 (1935), but appears to have been revived in *Squire* v. *Capoeman*. See Part VI B, *infra*.

the Service announced that the principles of Rev. Rul. 69-164, *supra*, were also applicable to Osage restricted-property estates. The memorandum says: "In our analysis of the two allotment acts [General Allotment Act and Osage Allotment Act] and their legislative history we found no indications that Congress intended to treat the Osage Indians any different than any of the tribes covered by the General Allotment Act of 1887. On the contrary, the general tone of both acts, the nature of the responsibilities assumed by the United States, and the similarities and basic concepts (especially the basic concept of conserving the property for the incompetent) indicate a common congressional intent underlying both acts."

F. To summarize the bare bones of the taxable status of restricted Indian property since *Squire* v. *Capoeman* in 1956: (1) Such Osage property and its proceeds have been expressly held immune, by court decision or Internal Revenue Service ruling, from the federal income tax and the federal estate tax; (2) restricted property of other Indians subject to the General Allotment Act or comparable legislation has been held immune, in *Squire* or since, from the federal income tax, the federal estate tax, *and state death taxes;* and (3) in rulings involving federal taxes, the Osage Allotment Act has been said by this court and by the Internal Revenue Service to be on all fours with the General Allotment Act with respect to the immunity of restricted trust property from taxation. But since the *West* case in 1948, there has been no holding exactly on the precise issue now before us—the liability of such Osage property to state death taxation.

V.

The Government's obligation as fiduciary

This is a suit against the United States, not against the Oklahoma taxing authorities, and the United States did not receive the tax money. The burden of the petition, rather, is that the Federal Government breached its fiduciary obli-

gation by paying the Oklahoma estate tax, and is therefore liable under 28 U.S.C. § 1491 (our general jurisdictional statute) for this breach of trust.

A. One of the major defenses is that, whether or not *West* is still good law, the Osage Agency acted reasonably, in 1967 and 1968, in relying on it, and accordingly the Government did not violate any trust obligation to Rose Mason's estate or her heirs. We need not decide what the defendant's duty would have been if there had been no hint of the possible fallibility of *West*. For we are satisfied that, by 1967 and 1968 when the tax was handed over, the shadows on that decision loomed so large that the Government, as fiduciary with the obligation to protect the Indians, should have tested the current acceptability of *West* by challenging collection of the tax.

The history recounted in Part IV, *supra*, shows that by 1967 the Supreme Court had decided *Squire*, the rationale of which is at the least difficult to harmonize with the theory of *Oklahoma Tax Comm'n* and *West;* in *Big Eagle* this court had applied *Squire* to Osage restricted income, and still another court had done the same to an Indian group likewise not under the General Allotment Act; courts had also extended the *Squire* principles to state death and federal estate taxes, in litigation involving both General Allotment Act Indians and other Indians (not Osages) subject to other laws. The General Allotment Act, these other statutes, and the Osage Act had all been said to have the same effect with respect to taxability.

The Internal Revenue Service had not formally applied the *Squire* rationale to federal estate taxes (which it did on April 7, 1969 in Rev. Rul. 69-164, *supra*) but this ruling came so soon that it could and should have triggered a suit by the Government against the state for a refund. Moreover, the revenue ruling was foreshadowed by the defendant's settlement of *Beartrack* v. *United States*, Ct. Cl. No. 281-67. This was an action in this court for refund of federal

estate taxes paid with respect to restricted trust properties of an Osage decedent. The defendant settled by a full refund on October 25, 1968. This was about two months before the Osage Agency made its last payment to Oklahoma with respect to Rose Mason's estate.

From all this, the Department of the Interior would have to conclude, in our view, that there was at the very least a serious question whether *West* remained viable and that, as a fiduciary for Rose Mason and her estate, the United States would have to test that issue by protesting the payment of the tax and litigating its applicability.[9] Faced with the developments in the law since *West* in 1948, no trustee could properly decide the matter finally for itself, but would have to remit the question to an appropriate tribunal. See Bogert, *Trusts and Trustees* (2d ed. 1959), §§ 581 (at 207), 582 (at 216), 594 (at 288), 602 (at 386).

B. The Congressional directive in the Osage Allotment Act that the properties with which we are concerned be held by the Federal Government in trust for the noncompetent allottee (see 34 Stat. 539, 543 (§ 3), 544 (§ 4), 544-45 (§ 5); 37 Stat. 86, 88 (§ 7); 61 Stat. 747) necessarily implies that the Bureau of Indian Affairs must act as a trustee, and subject to the general limitation that a trustee must act for the benefit of his *cestui*, reasonably, in good faith, and not arbitrarily or in abuse of discretion. The defendant does not deny that the Bureau was under this obligation, and the implication of such a duty is firmly supported by our prior decisions in comparable circumstances. See *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 19-20 (1944); *Menominee Tribe* v. *United States*, 101

[9] In *Oklahoma Tax Comm'n* v. *United States*, *supra*, 319 U.S. 598, the Federal Government brought the suit to recover the inheritance taxes imposed by Oklahoma. See, also, IV Scott, *Trusts* (3d ed. 1967), § 280 (at 2327, 2328); *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 369-70 (1968).

Ct. Cl. 22, 40 (1944); *Gila River Pima-Maricopa Indian Community* v. *United States*, 135 Ct. Cl. 180, 189, 140 F. Supp. 776, 780-81 (1956); *Oneida Tribe* v. *United States*, 165 Ct. Cl. 487, 493-94, *cert. denied*, 379 U.S. 946 (1964); *Seneca Nation* v. *United States*, 173 Ct. Cl. 917, 925 (1965); *Navajo Tribe* v. *United States*, 176 Ct. Cl. 502, 507-08, 364 F. 2d 320, 322-23 (1966); *Sac and Fox Tribe* v. *United States*, 179 Ct. Cl. 8, 27, 383 F. 2d 991, 1001, *cert. denied*, 389 U.S. 900 (1967); *Gila River Pima-Maricopa Indian Community* v. *United States*, 190 Ct. Cl. 790, 797-98, 427 F. 2d 1194, 1198, *cert. denied*, 400 U.S. 819 (1970); *cf. Seminole Nation* v. *United States*, 316 U.S. 286, 296-97 (1942).[10] In this instance, as we have just indicated, we think that the Bureau did violate this duty by paying the tax without seeking an adjudication whether it was actually owed.

c. Defendant argues, however, that responsibility lay on the plaintiffs, as administrators of the estate, to bring suit to recover the tax. Apparently it was possible for plaintiffs to do so (see *West* v. *Oklahoma Tax Comm'n*, *supra*, 334 U.S. 717; *Nash* v. *Wiseman*, *supra*, 227 F. Supp. 552 (W.D. Okla., 1963); *cf. Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365 (1968)), but they point out that they had nothing to do with the filing of the state estate tax return or the payment of the tax, and that the formal assessment of the tax by the Oklahoma Tax Commission was not filed in the County Court (the probate tribunal) until December 1968, and accordingly they did not receive formal notice of the

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[10] "* * * this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. * * * Under a humane and self imposed policy which has found expression in many acts of Congress [footnote omitted] and numerous decisions of this Court, it [the Federal Government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." 316 U.S. at 296-97.

payment until that time—some seven months after their original discharge as administrators.[11]

Even if plaintiffs should have surmised that the state's levy had been paid (see note 11, *supra*), we do not believe their only remedy was to file suit against the state in their own behalf. The United States was the trustee, and it had the primary responsibility to act. A *cestui* or ward is not limited to pursuit of a third party where the trustee has paid over money improperly to that third party. The injured *cestui* can bring action against the trustee to rectify the wrong. See IV Scott, *Trusts* (3d ed. 1967) § 279 A (at 2321).

Defendant also raises the specter of estoppel and laches, but neither can be shown here. This suit was begun less than two years after formal notice of the state assessment, and the United States is not precluded by limitations from suit over against the State of Oklahoma (see Part VII, *infra*). The administrators may have failed to protest the payment, but they were under no obligation to do so, especially in the absence of any notification by the Osage Agency that the money was to be handed over to the state. As we have held above (Part III, *supra*), plaintiffs were under no duty to exhaust administrative remedies before filing this action. Similarly, their omission to spur the Bureau of Indian Affairs to refuse to pay, or seek a refund, does not create an estoppel. The defendant was primarily responsible. IV Scott, *op. cit., supra.*

D. A suit against the United States on behalf of the estate of a non-competent Indian, for damages compensating the estate for breach by the Government of its trust

[11]The County Court was not asked to pass upon the propriety of paying the estate tax; the formal declaration in the final decree that "all taxes" were paid does not mean that the Osage Agency presented the estate tax matter to the probate court before payment. Defendant admits that the Osage Agency did not advise plaintiffs or their attorneys of the payment of the tax, but assumes that the local attorneys, who were knowledgeable in the field, must have known it would be paid.

obligation under a federal statute, is within 28 U.S.C. § 1491 as a claim founded upon an Act of Congress and for damages "in cases not sounding in tort." The Osage Allotment Act implies that, if the Government breaches its trust duty to the pecuniary disadvantage of a non-competent Osage allottee, due compensation will be paid by the United States. See *Ralston Steel Corp.* v. *United States*, 169 Ct. Cl. 119, 125-26, 340 F. 2d 663, 667-68, *cert. denied*, 381 U.S. 950 (1965); *Eastport S.S.* v. *United States*, 178 Ct. Cl. 599, 605-06, 372 F. 2d 1002, 1007-08 (1967). *Cf. Seminole Nation* v. *United States*, *supra*, 316 U.S. 286, 297, 300, 307-08 (1942); *Menominee Tribe* v. *United States*, *supra*, 101 Ct. Cl. 10, 20-21 (1944); *Menominee Tribe* v. *United States*, *supra*, 101 U.S. 22, 40-41 (1944); *Navajo Tribe* v. *United States*, *supra*, 176 Ct. Cl. 502, 509-10, 364 F. 2d 320, 322-23 (1966); *Hebah* v. *United States*, 192 Ct. Cl. 785, 428 F. 2d 1334 (1970).

E. There remains the problem of the damages for the Government's breach of its obligation to test the applicability of the Oklahoma tax. If the tax was validly imposed, plaintiffs suffered no monetary damage from the defendant's dereliction. On the other hand, if the tax was not owing, plaintiffs suffered more than a nominal wrong and are entitled to an appropriate remedy. Since the pecuniary injury was the amount of the invalid payment from the trust monies, the estate should recover that sum. It is plain to us, therefore, that in order to render a proper judgment in this litigation we must reach and decide the legality of the tax.

VI.

The current standing of West v. Oklahoma Tax Commission

Appraisal of the applicability of the tax necessarily thrusts us into an inquiry on the current status of *West* v. *Oklahoma Tax Comm'n*, *supra*, 334 U.S. 717 (1948). For an inferior tribunal this is a most delicate undertaking. It goes without saying that we cannot refuse or fail to follow a

Supreme Court decision, directly in point, because we disagree with its reasoning or think it erroneous. See, *e.g.*, *McCorkle* v. *The First Pennsylvania Banking & Trust Co.*, C.A. 4, decided April 20, 1972 (Sobeloff J.), 40 LW 2725. But our responsibility differs where there have been significant developments—in the Supreme Court itself, in the lower courts, and in relevant administrative practice—showing that the underpinnings of the highest court's decision have been seriously weakened or eroded. If that is so, a lower court can properly, without disrespect or flouting authority, make the judgment, in due care and circumspection, that the Court will no longer follow its earlier holding. *See, e.g., Barnette* v. *West Virginia State Board of Ed.*, 47 F. Supp. 251, 252-53 (S.D. W. Va. 1942) (Parker J.), *aff'd*, 319 U.S. 624 (1943); *United States* v. *Girouard*, 149 F. 2d 760, 765-67 (C.A. 1, 1945) (Woodbury J., dissenting), *rev'd*, 328 U.S. 61 (1946); *Andrews* v. *Louisville & Nashville R.R.*, 441 F.2d 1222 (C.A. 5, 1971), *aff'd*, U.S. Sup. Ct., No. 71-300, decided May 15, 1972, 40 LW 4511.

The history in Part IV, *supra*, shows, in our view, that there has been just such a significant development with respect to *West*—beginning with *Squire* v. *Capoeman*, 351 U.S. 1, in 1956. There has been a marked change in the evaluation of the reasons given by the Court for its result in *West* (and the precursor, *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598 (1943)), and there has also been a considerable increase in the kinds of taxes with respect to which restricted Indian property has been held immune. In several crucial aspects the essential bases of *West* have been so weakened that, in our opinion, the decision no longer stands as authoritative.

A. Following the lead of *Oklahoma Tax Comm'n* v. *United States*, *supra*, the *West* opinion put aside as immaterial the facts that, if the tax was leviable, Oklahoma could impose a lien on the property (334 U.S. at 725) and the estate could be much depleted through successive pay-

ments of state death taxes before the end of the trust period (334 U.S. at 725-26, 727). *Squire* took the opposite positions that (1) provision in an allotment statute that the property was to be transferred, at trust end, free of all charge or incumbrance "might well be sufficient" to bar taxation (351 U.S. at 6-7), and (2) it is necessary to preserve the property wholly intact for the Indian—including immunity from taxation—so that he can "go forward when declared competent with the necessary chance of economic survival in competition with others" (351 U.S. at 10).

Again, *West* demanded affirmative indications by Congress "that these burdens require that the transfer be immune" from tax liability (334 U.S. at 727). See also *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. at 604, 606, 607, 609. *Squire*, reversing the presumption, considered these burdens so important that Congress should affirmatively authorize taxibility if the desire was to permit it.

Thus, both of the main foundations for *West* (and *Oklahoma Tax Commission*) were disavowed in *Squire* v. *Capoeman*. It is this latter approach which has been uniformly applied in the subsequent lower court cases and administrative rulings referred to in Part IV, *supra*. The *West-Oklahoma Tax Commission* attitude has been silently dropped, and its reasoning no longer utilized. As their texts reveal, those two opinions were the yield of a period in which the Supreme Court was intent on doing away with the various forms of intergovernmental tax immunity, and Indian tax exemption had been supported on that theoretical basis. For at least the last fifteen years, the judicial climate has changed to concentrate, not on the relationship of Indian tax immunity to other exemptions, but on the particular social goals Congress has sought to reach through its restrictions on Indian properties.

B. It seems clear, too, that in deciding *Oklahoma Tax Comm'n* and *West*, the Supreme Court thought (at that time) that restricted Indians were subject to both federal

income and estate taxes with respect to restricted and trust property—and that this was an important factor in the decisions. The *Oklahoma Tax Commission* opinion indicates this very plainly. 319 U.S. at 601, 608, including fn. 12 (relating to the federal estate tax). The Court referred (at 601) to *Superintendent* v. *Commissioner*, 295 U.S. 418, as broadly holding "that the restricted income of Indians was subject to the federal income tax" (see note 8, *supra*), and observed (319 U.S. at 608): "Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes."[12]

In *West*, the briefs before the Supreme Court show that the Oklahoma Tax Commission (the appellee) stressed that Osage trust properties were then subject to both federal income tax and federal estate tax; as to the latter, the brief included a letter from the Commissioner of Internal Revenue saying that federal estate taxes were being imposed on and collected from estates of restricted Osage Indians.[13] West's brief did not dispute this assertion.

Today the situation is very different. *Squire* distinguished *Superintendent* v. *Commissioner, supra*—despite its unqualified language—as limited to reinvestment income (351 U.S. at 9), and held direct, initial income of those restricted Indians nontaxable. Income from Osage

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[12]The brief for the United States, on behalf of the Indians, in *Oklahoma Tax Commission* expressly agreed that the federal estate tax was applicable.

[13]The Service limited this determination to estates of Indian decedents dying after June 25, 1940, when it was decided to impose the tax on this type of estate.

The vagaries of federal income taxation of restricted Indian income are recited in the Supplemental Memorandum for the Petitioner, in *Squire* v. *Capoeman*, US. Sup. Ct., Oct. Term 1955, No. 134. At the time of *West* and *Oklahoma Tax Commission* it appears that the tax was being collected under an opinion of the Attorney General holding it applicable. See, also, *Squire*, 351 U.S. at 8-9.

properties of the kind now at stake has been specifically held not subject to federal income tax. *Big Eagle* v. *United States, supra,* 156 Ct. Cl. 665, 300 F. 2d 765 (1962). And the Internal Revenue Service has ruled that this property is likewise immune from the federal estate tax (see Part IV, *supra*). The demand for equal treatment of state and federal taxes, which seemed to move the Court in *Oklahoma Tax Commission* and *West*, now works the other way—against taxibility.[14]

c. Though *Squire* dealt with the General Allotment Act and the Osage statute contains different wording, the developments since *Squire* have shown that no distinction should be made on the basis of the particular language of the various pieces of Indian allotment legislation. The lower courts have applied the *Squire* principles to Indians not covered by the general act (*Kirkwood* v. *Arenas; Big Eagle* v. *United States; United States* v. *Hallam*), and the Internal Revenue Service has used them for the Osages (Technical Advice Memo, Aug. 15, 1969). See Parts IV and V A, *supra*. As both this court (in *Big Eagle*) and the Revenue Service have said, the terms of the Osage Allotment Act (see Part IV A, *supra*) are sufficiently close to those of the General Allotment Act to require the same approach and the same reading.[15]

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[14]In *Landman* v. *United States*, 103 Ct. Cl. 199, 209-10, 58 F. Supp. 836 (1945), this court indicated that property exempt from state estate taxes was also necessarily exempt from the federal estate tax; and in the decision which led to *West* the Supreme Court of Oklahoma considered that state and federal immunity or lack-of-immunity was correlative. *Yarbrough* v. *Oklahoma Tax Comm'n*, 200 Okla. 402, 193 P. 2d 1017, 1020-21 (1947), *aff'd*, 334 U.S. 841 (1948).

[15]In particular, the portions of the Osage Act which forbid trust assets from being "subject to lien, levy, attachment, or forced sale to satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency", and provide that "all royalties and bonuses arising therefrom [the Osage mineral lands] • • • shall be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law."

D. Nor can we properly distinguish *Squire* as involving an income tax, not a death levy. *West*, it is true, does differentiate death taxes from property taxes as "imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits" (334 U.S. at 727). This dissimilarity seems to have been noted solely in connection with that taxpayer's argument that there was a difference between the Indian-owned-but-restricted property in *Oklahoma Tax Commission* and the United States-owned-trust property in *West;* the Supreme Court uses the incidence of the estate tax to show that the difference from *Oklahoma Tax Commission* was not meaningful in the context of tax immunity.

In any event, the *Squire* rationale, rather than this distinction in *West*, has been carried over to death taxes by the Internal Revenue Service (for federal estate taxes)[16] and by lower courts (for both federal and state death taxes). See Part IV, *supra*. We, too, see no reason for carving out estate and inheritance taxes for separate treatment. The *Squire* principles—especially the warning against diminution of restricted assets through payment of taxes—apply at least equally, perhaps even more, to death levies with their possible successive and cumulative impact before the restriction ends.

E. *Squire* related, of course, to a federal tax, and we are now concerned with a state impost, but that does not make the *Squire* reasoning irrelevant. As we have pointed out, the same factors which influenced the Court to find immunity from the federal income tax in the allotment legislation are present for death taxes, state or federal. The Internal Revenue Service has agreed for the federal estate tax. It is clear that Congress has the power to immunize

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[16]Defendant's brief says candidly that "Revenue Ruling 69-164 [see Part IV, *supra*] has the appearance of being contrary to the decision of the Supreme Court in *West*." There is, however, no suggestion that the ruling is being (or has been) repudiated.

these restricted properties from state levies.[17] *Cf. Warren Trading Post Co.* v. *United States*, 380 U.S. 685 (1965); *Williams* v. *Lee*, 358 U.S. 217 (1959). And it would be strange and uncharacteristic for Congress to withhold the federal estate tax (on the ground it could deplete the corpus) but to authorize the comparable state levy.

However, a statement in *Oklahoma Tax Commission* is stressed—"If Congress intended to relieve these Indians from the burden of a state inheritance tax as a consequence of our National policy toward Indians, there is still no reason why we should imply that it intended the burden to be borne so heavily by one state." 319 U.S. at 609. That observation was probably made in the belief that federal income and estate taxes were collectible (see Part VI B, *supra*), an assumption no longer so. Moreover, Oklahoma does not now appear to be singled out; since *Squire*, other states inhabited by Indians with restricted property are no doubt under the same disability. See *Kirkwood* v. *Arenas*, *supra*, 243 F. 2d 863 (C.A. 9, 1957) (California inheritance tax).[18]

F. At the end of the *West* opinion, the Court appends the unelaborated remark that *Oklahoma Tax Commission* "makes clear that should any of the properties transferred be exempted by Congress from direct taxation they cannot be included in the estate for inheritance tax purposes. No such properties are here involved, however." 334 U.S. at 727-28. When it adopted those sentences, the Court, in all probability, considered the Osage trust properties to be subject to federal income tax (Part VI B, *supra*), and that may have been the reason why it thought no properties

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[17]No argument is made by the defendant or Oklahoma that Congress is without power to exempt such Indian estates from state taxation.

[18]In quite different contexts, the Osage Allotment Act contains a few express provisions for taxation by the state. It is not argued that any of these apply to the estate tax as involved here, and we are satisfied that they do not.

exempt from direct taxation were there involved. The income tax is often characterized as a "direct tax" (that is why the Sixteenth Amendment had to be adopted, *cf. Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, 158 U.S. 601 (1895)). Currently, however, income from Osage trust property is exempt. The final qualification in *West* may therefore have become effective to remove the restricted property from the state tax even under the *West* opinion itself.[19]

G. On these grounds, we feel compelled to conclude that, because of the developments from *Squire* on, the *West* result is no longer controlling on us, and the opposite holding is mandated here. This leads directly to our ruling that the state tax was not owed, and that plaintiffs are entitled to recover from the United States for its breach of fiduciary duty in paying the tax when it should not. We may turn out to be mistaken, but the decision we make is the one we believe would be "the event of an appeal in the case before us" (Judge Learned Hand, dissenting in *Spector Motor Service, Inc.* v. *Walsh*, 139 F.2d 809, 823 (C.A. 2, 1943)).[20]

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[19]On the other hand, the Court may possibly have meant to include only property which is immune from direct property taxation (see *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. at 610-11). Congress has expressly authorized Oklahoma to collect a gross production tax on minerals, before the headright pro-rata income distribution is made. Acts of March 3, 1921, 41 Stat. 1249, and of April 25, 1940, 54 Stat. 168. Perhaps the Court considered this tax as showing that the involved properties had not been exempted by Congress from direct taxation.

Since defendant sees this production tax as somehow supporting the imposition of the state death tax, we note that we cannot infer from an express and limited grant of power to tax a more general and unlimited right which is unexpressed.

[20]Judge Hand said:

"It is always embarrassing for a lower court to say whether the time has come to disregard decisions of a higher court, not yet explicitly overruled, because they parallel others in which the higher court has expressed a contrary view. I agree that one should not wait for formal retraction in the face of changes plainly foreshadowed; the higher court may not entertain an appeal in the case before the lower court, or the parties may not

VII.

Oklahoma's liability to the United States

If, as we have just held, the Oklahoma estate tax should not have been paid or collected with respect to this Indian trust and restricted property, the state is liable over to the United States, which, as trustee, improperly paid the tax. As trustee, the United States can sue for return of the money. See IV Scott, *Trusts* (3d ed. 1967) §§ 279A (at 2321), 280.5 (at 2327, 2328); *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 369-70 (1968). The Federal Government expressly asks for such recovery over, and there is no barrier to grant of that prayer. The state statute of limitations does does not run against the United States, whether suing on behalf of Indians or otherwise. See *Board of Commissioners* v. *United States*, 308 U.S. 343, 351 (1939); *United States* v. *Summerlin*, 310 U.S. 414 (1940); *United States* v. *John Hancock Mut. Ins. Co.*, 364 U.S. 301, 308 (1960). Nor is the Government's claim for recovery required to be brought in the state court; it may be instituted, as here, in a federal court. *Cf. Oklahoma Tax Comm'n* v. *United States*, *supra*, 319 U.S. 598 (1943); *Poafpybitty* v. *Skelly Oil Co.*, *supra*.

CONCLUSION

Plaintiffs are entitled to recover from the defendant, their motion for summary judgment is granted, and the defendant's motion is denied as against the plaintiffs. The United States, in turn, is entitled to recover the full amount of the judgment from the State of Oklahoma, third-party defendant, and accordingly the defendant's motion for sum-

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[20] (Continued)

choose to appeal. In either event the actual decision will be one which the judges do not believe to be one which the higher court would make. • • • Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty is to divine, as best it can, what would be the event of an appeal in the case before it."

mary judgment for such relief is granted. The amount of recovery by plaintiffs against defendant and by defendant against third-party defendant will be determined under Rule 131(c).

SKELTON, *Judge*, dissenting:

I think the majority has fallen into error in refusing to follow the decision of the Supreme Court in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948), which it admits involved the identical problem we have in the instant case and is the only decision of that Court that has ever decided the exact question we have before us. That case has never been overruled and the law under which it was decided has not been changed. Consequently, we are required to follow it. Furthermore, it was correctly decided, as will be shown below.

The *West* case involved the power of the State of Oklahoma to levy an inheritance tax on the estate of a deceased restricted (noncompetent) Osage Indian which is the exact question before us in the instant case. The Court held in no uncertain terms that the State of Oklahoma did have such power and the tax was legal because it was a tax on the *transfer* of the property of the noncompetent Indian after his death and not a tax on the trust property itself. The Court said:

> * * * An inheritance or estate tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60; *Whitney* v. *Tax Commission*, 309 U.S. 530, 538. In this case, for example, the decedent had a vested interest in his Osage headright; and he had the right to receive the annual income from the trust properties and to receive all the properties at the end of the trust period. At his death, these interests and rights passed to his heir. It is the transfer of these incidents, rather than

the trust properties themselves, that is the subject of the inheritance tax in question. In this setting, refinements of title are immaterial. Whether legal title to the properties is in the United States or in the decedent and his heir is of no consequence to the taxability of the transfer.

The result of permitting the imposition of the inheritance tax on the transfer of trust properties may be, as we have noted, to deplete the trust corpus and to create lien difficulties. But those are normal and intended consequences of the inheritance tax. And until Congress has in some affirmative way indicated that these burdens require that the transfer be immune from the inheritance tax liability, the *Oklahoma Tax Commission* case permits that liability to be imposed. * * * [*Id.* at 727.]

As may be seen from the foregoing, the decision is squarely in point, not only on the law question in our case, but also on the facts, as both cases involve the same kind of property of Osage Indians and the same kind of inheritance tax levied by the State of Oklahoma. The majority opinion admits all of this, but refuses to follow the *West* decision. Instead it questions the viability of the *West* case and relies on the decision in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), and the decisions of various inferior courts.

The *Capoeman* case is clearly distinguishable from the *West* case on both the facts and the law. That case involved the question of whether or not the Federal Government could levy an income tax on the income of living noncompetent Quinaielt Indians derived from the sale of timber cut from lands held in trust for them by the government under the provisions of the General Allotment Act of 1887 (24 Stat. 388, 25 U.S.C. § 331 *et seq.*). The Court held the income tax on the proceeds of the sale invalid. In doing so, it quoted with approval an opinion of an attorney general as follows:

"* * * In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian." [Footnote omitted.] [*Id.* at 8.]

In that case, the court was dealing with a *direct tax* on the property of a *living noncompetent* Indian, and no inheritance tax imposed by a state was involved. Furthermore, the tax was being imposed on the property of the wards by their guardian during their lifetime. No such facts existed in *West* nor do they exist in our case.

The Court in *Capoeman* showed clearly that it was protecting the property of the noncompetent Indians during their lifetime so that when they became competent their property would not be depleted and they could take their rightful place in society. This is clearly shown by the following statements of the Court:

* * * The purpose of the allotment system was to protect the Indians' interest and "to prepare the Indians to take their place as independent, qualified members of the modern body politic." * * * [*Id.* at 9.]

* * * Unless the proceeds of the timber sale are preserved for respondent, he cannot go forward *when declared competent* with the necessary chance of economic survival in competition with others. * * * [Emphasis supplied.] [*Id.* at 10.]

In the case at hand, we are not dealing with a living noncompetent Indian who may someday be declared competent and at that time will need to have his property intact so that he can make his own way in our economic society. Here we are dealing with a deceased noncompetent Indian whose noncompetency died with her. All of her property has already been transferred and distributed to her heirs, who, as far as the records show are competent and are not restricted in any way. The Oklahoma tax was levied on the transfer and distribution of the property of the deceased

Indian to her heirs. This is exactly the kind of a tax that the *West* decision held to be valid.

The majority discusses other decisions of lower courts and a Revenue Ruling of the Internal Revenue Service to the effect that trust funds of Indians are not subject to Federal income tax or estate taxes. These authorities are not in point because taxes of that kind are not involved here. Furthermore, as the Supreme Court pointed out in *Capoeman*, the ward cannot be taxed by the guardian. The majority notes a few cases of lower courts that Indian trust property is not subject to state inheritance taxes. If those cases involve different Indians whose property is held in trust under different Acts of Congress to the Osage Allotment Act here involved, they are not in point. If they involve the same facts and the same legal questions we have in the instant case, they are in direct conflict with the decision of the Supreme Court in the *West* case and are not controlling. For all of these reasons, I have not discussed them individually.

From the foregoing, it is readily apparent that the *West* decision is viable and controlling, and we are not free to question its viability. Neither do we have the power or authority to overrule it by relying on decisions of lower courts nor by speculating on what the Supreme Court might do sometime in the future if this question should again be presented to it.

I would deny plaintiffs' motion for summary judgment and grant that of the defendant, and dismiss plaintiffs' petition.

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1947

*MARY MORTON WEST, Osage Allottee No. 192,
Appellant,

v.

OKLAHOMA TAX COMMISSION

(334 US 717-728.)

SUMMARY

See headnote 1.

HEADNOTES

Classified to U.S. Supreme Court Digest, Annotated

Succession Taxes, § 15—what taxable—property held in trust by United States for Osage Indians.

1. The state of Oklahoma may constitutionally levy an inheritance tax in respect of property held in trust by the United States for the benefit of a restricted Osage Indian which upon his death descended to his heirs subject to the terms of the statutory trust.

Taxes, § 85—what taxable—Federal property.

2. Property of the United States is immune from any form of state taxation unless Congress expressly consents thereto. This immunity grows out of the supremacy of the Federal government and the necessity that it be able to deal with its own property free from any interference or embarrassment that state taxation might impose. (Arguendo)

Succession Taxes, § 2—nature.

3. An inheritance or estate tax is not levied on the property of which an estate is composed, but upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits.

[*See annotation references*, 1 and 2.]

[APPENDIX]

[No. 489.]

Argued March 29 and 30, 1948. Decided June 14, 1948.

APPEAL by the sole heir of a restricted Osage Indian from a judgment of the Supreme Court of the State of Oklahoma affirming the action of the State Tax Commission in levying an inheritance tax in respect of property held in trust by the United States for the decedent. Affirmed.

See same case below, 199 Okla —,193 P2d 1017.

Frank T. McCoy, of Pawhuska, Oklahoma, argued the cause, and, with John T. Craig and John R. Pearson, also of Pawhuska, Oklahoma, and Frank Mahan, of Fairfax, Oklahoma, filed a brief for appellant:

The decision below is legally erroneous and in irreconcilable conflict with prior decisions of this court and other Federal courts. See Taylor v. Tayrien (CCA10th Okla) 51 F2d 884; McCurdy v. United States, 264 US 484, 68 L ed 801, 44 S Ct 345; Adams v. Osage Tribe of Indians (DC) 50 F2d 918; Adams v. Osage Tribe of Indians (CCA10th Okla) 59 F2d 653, cert den 287 US 652, 7 L ed 563, 53 S Ct 116; United States v. Thurston County (CCA8th) 143 F 287; McKnight v. Panther, 190 Okla 127, 120 P2d 973.

Indian property held in trust by the United States is constitutionally exempt from state taxation. United States v. Rickert, 188 US 432, 47 L ed 532, 23 S Ct 478; McCurdy v. United States, 264 US 484, 68 L ed 801, 44 S Ct 345; United States v. Thurston County (CCA8th) 143 F 287. See also Mahnomen County v. United States, 319 US 474, 87 L ed 1527, 63 S Ct 1254; United States v. Fremont County (CCA10th Wyo) 145 F2d 329. Cf. United States v. Mummert (CCA8th) 15 F2d 926.

ANNOTATION REFERENCES

1. On nature of inheritance tax, generally, see annotation in 33 LRA NS 606.

2. On validity, operation, and effect of inheritance and succession taxes, see annotation in 42 L ed 1037.

The imposition of the tax in controversy would interfere with the government's duty to the Osage Indians by diminishing the trust estate. Cf. Re Denison (DC Okla) 38 F2d 662, 15 Am Bankr NS 455; United States v. Osage County (CC Okla) 193 F 485; United States v. Osage County (CCA8th) 216 F 883, 886. Cf. also Choate v. Trapp, 224 US 665, 56 L ed 941, 32 S Ct 565; Carpenter v. Shaw, 280 US 363, 74 L ed 478, 50 S Ct 121; United States v. Ferry County (DC Wash) 24 F Supp 289.

So far as the corpus of the trust property is concerned, all the restricted Osage Indian has, and all he passes on to his heirs, is the right to certain income from the trust estate so long as the property continues to be held in trust by the Federal government. McCurdy v. United States, 246 US 263, 62 L ed 706, 38 S Ct 289.

Not only the distribution of the surplus but likewise distribution of the income from the tribal property is subject to the will of Congress.

So far as the nature of the tax is concerned, whether ad valorem or excise, the principle is the same if the power to levy the tax is wanting.

R. F. Barry, of Oklahoma City, Oklahoma, and Joe M. Whitaker, of Eufaula, Oklahoma, argued the cause, and, with C. W. King, also of Oklahoma City, Oklahoma, filed a brief for appellee:

The title of a restricted Osage in his properties is for all practical purposes the same as that of a restricted member of the Five Civilized Tribes. The tax here sought to be imposed (an estate tax), is an excise tax. The tax is im-

posed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. It is not levied on the property of which an estate is composed. Re Whitson, 88 Okla 197, 212 P 752; Landman v. Commissioner (CCA10th) 123 F2d 787; McGannon v. State, 33 Okla 145, 124 P 1063, Ann Cas 1914B 620; 28 Am Jur 12, Inheritance, Estate, Succession, and Gift Taxes, § 10.

The imposition of an estate tax would not interfere with the government's duty to the Osages by diminishing the trust estate. See Blackbird v. Commissioner (CCA10th) 38 F2d 976; Landman v. Commissioner (CCA10th) 123 F2d 787; New York v. United States, 326 US 572, 90 L ed 326, 66 S Ct 310; Oklahoma Tax Commission v. United States, 319 US 598, 87 L ed 1612, 63 S Ct 1284; Superintendent of Five Civilized Tribes v. Commissioner, 295 US 418, 79 L ed 1517, 55 S Ct 820; United States v. Osage County (CC Okla) 193 F 485.

The tax imposed is an excise tax imposed upon the shifting of economic benefits and the privilege of transmitting and receiving these benefits. Commissioner v. Holmes, 326 US 480, 90 L ed 228, 66 S Ct 257; Globe Indem. Co. v. Bruce (CCA10th Okla) 81 F2d 143; Graves v. Elliott, 307 US 383, 83 L ed 1356, 59 S Ct 915; Graves v. Schmidlapp, 315 US 657, 86 L ed 1097, 62 S Ct 870, 141 ALR 948; Re Martin, 183 Okla 177, 80 P2d 561; Whitney v. State Tax Commission, 309 US 530, 84 L ed 909, 60 S Ct 635; Title 25, § 26, Subsections 1, 2, 3 and 4, OS 1941; Title 68, § 989e, Subsection (3), OS 1941.

*Mr. Justice Murphy delivered the opinion of the Court.

Headnote 1

This appeal concerns the power of the State of Oklahoma to levy an inheritance tax on the estate of a restricted Osage Indian. Specifically, the problem is whether property held in trust by the United States for the benefit of the Indian may be included within the taxable estate.

Charles West, Jr., was a restricted, full-blood, unallotted, adult Osage Indian. He died intestate in 1940, a resident of Oklahoma. No certificate of competency was ever issued to him. Surviving him was his mother, appellant herein, who is a restricted, full-blood Osage Indian. The entire estate passed to her as the sole heir at law.[1]

The Oklahoma Tax Commission entered an order levying a tax on the transfer of the net estate, valued at $111,219.18. With penalties, the total tax imposed was $5,313.35. Appellant made timely objection to the inclusion of certain items in the taxable estate. These items formed the bulk of the estate and had been held in trust for the decedent by the United States, acting through the Secretary of the Interior. Act of June 28, 1906, 34 Stat 539, c 3572, as amended [March 3, 1921] 41 Stat 1249, c 120, [March 2, 1929] 45 Stat 1478, c 493, [June 24, 1938] 52 Stat 1034, c 645. The trust properties involved were as follows:

(1) One and 915/2520ths Osage mineral headrights. This item represented the decedent's undivided interest in the oil, gas, coal and other minerals under the lands in Osage County, Oklahoma, said minerals having been reserved to the use of the Osage Tribe by the Act of June 28, 1906.[2]

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[1]The decedent was also survived by a widow. But she was prohibited by law from inheriting any part of the estate unless she was of Indian blood, a matter which was in dispute. A settlement was reached whereby the widow received a certain amount from the estate, apparently in return for giving up her claim as an heir.

[2]An Osage headright has been defined by one court as "the interest that a member of the tribe has in the Osage tribal trust estate, and the trust consists of the oil, gas, and mineral rights, and the funds which were placed to the credit of the Osage tribe, all fully set out in the above act [Act of June 28, 1906, 34 Stat. 539, c 3572]." Re Denison (DC Okla) 38 F2d 662, 664, 15 Am Bankr NS 455. Another court has made this definition: "The right to receive the trust funds and the mineral interests at the end of the trust period, and during that period to participate in the distribution of the bonuses and royalties arising from the mineral estates

(2) Surplus funds in the United States Treasury, representing accruals of income to the decedent from the headrights.

(3) Stocks and bonds purchased by and in the name of the United States and held for the decedent by the Secretary of the Interior. These purchases were made with the surplus funds accruing from the headrights.

(4) Trust funds in the hands of the Treasurer of the United States, representing decedent's share of the proceeds of the sale of the Osage Tribe's lands in Kansas.

(5) Personal property purchased with surplus funds.

Appellant claimed that these properties were immune from state taxation by virtue of the relevant provisions of the Constitution, treaties and laws of the United States; hence the Oklahoma Inheritance and Tranfer Tax Act of 1939 (§§ 989-989t, title 68, Okla Stat 1941) which authorized the assessment on the properties was invalid in this respect. The Oklahoma Tax Commission rejected this contention and the Supreme Court of Oklahoma affirmed. 200 Okla —, 193 P2d 1017.

It is essential at the outset to understand the history and nature of the arrangement whereby the United States holds in trust the properties involved in this case. See Cohen, Handbook of Federal Indian Law (1945) 446-455. In [July 19] 1866, the United States and the Cherokee Nation of Indians executed a comprehensive treaty covering their various relationships. 14 Stat 799. It was there agreed that the United States might settle friendly Indians in certain areas of Cherokee territory, including what is now

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[2] (Continued)

and the interest on the trust funds, is an Osage headright." Globe Indem. Co. v. Bruce (CCA10th Okla) 81 F2d 143, 148, 149. Headrights are not transferable and do not pass to a trustee in bankruptcy. Taylor v. Tayrien (CCA10th Okla) 51 F2d 884; Taylor v. Jones (CCA10th Okla) 51 F2d 892, 18 Am Bankr NS 640.

Osage County, Oklahoma; these areas had previously been conveyed by the United States to the Cherokees. The treaty further provided that the areas in question were to be conveyed in fee simple to the tribes settled by the United States "to be held in common or by their members in severalty as the United States may decide."

The Osage Indians subsequently moved to the Indian Territory and settled in what is now Osage County. In 1883, pursuant to the 1866 treaty, the Cherokees conveyed this area to the United States "in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians." It is significant that fee simple title to the land was not conveyed at this time to the Osages; instead, the United States received that title as trustee for the Osages. Nor was any distinction here made between the land and the minerals thereunder, legal title to both being transferred to the United States.

On June 28, 1906, the Osage Allotment Act, providing for the distribution of Osage lands and properties, became effective. 34 Stat 539, c 3572. See Levindale Lead & Zinc Co. v. Coleman, 241 US 432, 60 L ed 1080, 36 S Ct 644. Provision was there made for the allotment to each tribal member of a 160-acre homestead, plus certain additional surplus lands. These allotted lands, said § 7, were to be set aside "for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided." The homestead was to be inalienable and nontaxable for 25 years or during the life of the allottee. The surplus lands, however, were to be inalienable for 25 years and nontaxable for 3 years, except that the Secretary of the Interior might issue a certificate of competence to an adult, authorizing him to sell all of his surplus lands; upon the issuance of such a certificate, or upon the death of the allottee, the surplus lands were to become immediately taxable. Section 2, Seventh; Choteau v. Burnet, 283 US 691, 75 L ed 1353, 51 S Ct 598.

Section 3 of the Act stated that the minerals covered by these lands were to be reserved to the Osage Tribe for a period of 25 years and that mineral leases and royalties were to be approved by the United States. Section 4 then provided that all money due or to become due to the tribe was to be held in trust by the United States for 25 years;[3] but these funds were to be segregated and credited pro rata to the individual members or their heirs, with interest accruing and being payable quarterly to the members. Royalties from the mineral leases were to be placed in the Treasury of the United States to the credit of the tribal members and distributed to the individual members in the same manner and at the same time as interest payments on other moneys held in trust. In this connection, it should be noted that quarterly payments of interest and royalties became so large that Congress later limited the amount of payments that could be made to those without certificates of competence; provision was also made for investing the surplus in bonds, stocks, etc.[4]

According to § 5 of this 1906 statute, at the end of the 25-year trust period "the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the indi-

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[3]The trust under which these funds were to be held was established in [Sept. 29] 1865 by treaty between the United States and the Great and Little Osage Indians, 14 Stat 687. By the terms of this treaty, the proceeds of the sale of Osage lands in Kansas were to be placed in the United States Treasury to the credit of the tribe. Provisions for carrying out the terms of this treaty were made by Congress in [June 16] 1880, 21 Stat 291, c 251.

[4]By the Act of March 3, 1921, 41 Stat. 1249, c 120, Congress provided that so long as the income should be sufficient the adult Osage Indian without a certificate of competency should be paid $1,000 quarterly. See also Act of Feb. 27, 1925, 43 Stat 1008, c 359. In the Act of June 24, 1938, 52 Stat 1034, c 645, it was provided that where the restricted Osage had surplus funds in excess of $10,000 he was to be paid $1,000 quarterly, but if he had surplus funds of less than $10,000 he was to receive quarterly only his current income, not to exceed $1,000 quarterly.

vidual members of the Osage tribe, according to the role herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided." It was also stated in § 2, Seventh, that the minerals upon the allotted lands "shall become the property of the individual owner of said land" at the expiration of 25 years, unless otherwise provided by Congress.

Moreover, § 6 provided that the lands, moneys and mineral interests of any deceased member of the Osage Tribe "shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma." Congress subsequently provided, in § 8 of the Act of April 18, 1912, 37 Stat 86, 88, c 83, that any adult member of the tribe who was not mentally incompetent could by will dispose of "any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed," in accordance with the laws of the State of Oklahoma. Such wills could not be probated, however, unless approved by the Secretary of the Interior before the death of the testator.

The 25-year trust period established by the 1906 statute has been extended several times by Congress, first to 1946 (41 Stat 1249, c 120), then to 1958 (45 Stat 1478, c 493), and finally to 1984 (52 Stat 1034, c 645). The last extension provided that the "lands, moneys, and other properties now or hereafter held in trust or under the supervision of the United States for the Osage Tribe of Indians, the members thereof, or their heirs and assigns, shall continue subject to such trusts and supervision until January 1, 1984, unless otherwise provided by Act of Congress."

Application of the foregoing provisions to the estate in issue produces this picture: Legal title to the mineral in-

terests, the funds and the securities constituting the corpus of the trust estate is in the United States as trustee. The United States received legal title to the mineral interests in 1883, when it took what is now Osage County from the Cherokees in trust for the Osages; and that title has not subsequently been transferred. Legal title to the various funds and securities adhered to the United States as the pertinent trusts were established and developed. Beneficial title to these properties was vested in the decedent and is now held by his sole heir, the appellant. The beneficiary at all times has been entitled to at least a limited amount of interest and royalties arising out of the corpus. And the beneficiary has a reversionary interest in the corpus, an interest that will materialize only when the legal title passes from the United States at the end of the trust period. But until that period ends, the beneficiary has no control over the corpus. See Globe Indem. Co. v. Bruce (CCA10th Okla) 81 F2d 143, 150.

Headnote 2

Since 1819, when M'Culloch v. Maryland, 4 Wheat (US) 316, 4 L ed 579, was decided, it has been established that the property of the United States is immune from any form of state taxation, unless Congress expressly consents to the imposition of such liability. Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 US 151, 29 L ed 845, 6 S Ct 670; United States v. Allegheny County, 322 US 174, 88 L ed 1209, 64 S Ct 908. This tax immunity grows out of the supremacy of the Federal Government and the necessity that it will be able to deal with its own property free from any interference or embarrassment that state taxation might impose. M'Culloch v. Maryland, 4 Wheat (US) 316, 4 L ed 579, supra; Wisconsin C. R. Co. v. Price County, 133 US 496, 33 L ed 687, 10 S Ct 341.

In United States v. Rickert, 188 US 432, 47 L ed 532, 23 S Ct 478, the same rule was held to apply where the United States holds legal title to land in trust for an Indian

or a tribe. The United States there held legal title to certain lands in trust for a band of Sioux Indians which was in actual possession of the lands. This Court held that neither the lands nor the permanent improvements thereon were subject to state or local ad valorem taxes. It was emphasized that the fee title remained in the United States in obvious execution of its protective policy toward its wards, the Sioux Indians. To tax these lands and the improvements thereon, without congressional consent, would be to tax a means employed by the Government to accomplish beneficent objects relative to a dependent class of individuals. Moreover, the United States had agreed to convey the lands to the allottees in fee at the end of the trust period "free of all charge or incumbrances whatsoever." If the tax in question were assessed and unpaid, the lands could be sold by the tax authorities. The United States would thus be so burdened that it could not discharge its obligation to convey unencumbered land without paying the taxes imposed from year to year.

Further application of the tax immunity rule to land held in trust by the United States for the benefit of Indians was made in McCurdy v. United States, 264 US 484, 68 L ed 801, 44 S Ct 345. That case involved surplus lands that had been allotted to members of the Osage Tribe. It will be recalled that the Osage Allotment Act of June 28, 1906, had made these surplus lands expressly taxable after three years or at the death of the allottee. The allottees in the McCurdy Case died within the three-year period but before deeds to their allotted lands had been executed and delivered to them. Oklahoma sought to place a tax on the lands, the taxable date being within the three-year period and before the execution and delivery of the deeds to the heirs of the allottees. This Court held that legal title to the lands in issue was still in the United States as trustee on the taxable date, title not passing until the execution and delivery of the deeds. In reliance on the Rickert Case, the conclusion was reached that the lands were not taxable while held in

trust by the United States. See also United States v. Fremont County (CCA 10th Wyo) 145 F2d 329; United States v. Thurston County (CCA 8th) 143 F 287.

Since the property here involved is all held in trust by the United States for the benefit of the decedent and his heirs, it is thought to be immune from any form of state taxation under the decisions in the Rickert and McCurdy Cases. Reference is made to certain provisions of the Oklahoma Inheritance and Transfer Tax Act which indicate that the inheritance tax in issue might have a very real and direct effect upon the property to which the United States holds title, an effect similar to that which was emphasized in the Rickert Case. The Act applies, of course, to the transfer of estates held in trust. § 989. Specific provision is then made in § 989i that "Taxes levied under this Act shall be and remain a lien upon all the property transferred until paid." Provision is also made for the sale of estate property if necessary to satisfy the tax. §§ 989i and 989l. It is therefore possible that if the tax were unpaid Oklahoma might try to place a lien upon the property which is being transferred, property as to which the United States holds legal title. Complications might arise as to the validity of such a lien. And the United States would be burdened to the extent of opposing the imposition of the lien or seeing that the tax was paid so as to avoid the lien.

Moreover, insofar as the inheritance tax is paid out of the surplus and trust funds held by the United States, there is a depletion of the corpus to which the United States holds legal title. Such depletion makes that much smaller the estate which the Government has seen fit to hold in trust for the decedent's heirs. If the estate is to be tapped repeatedly by Oklahoma until 1984 by the deaths of the various heirs, the result may be a substantial decrease in the amount then available for distribution.

But our decision in Oklahoma Tax Commission v. United States, 319 US 598, 87 L ed 1612, 63 S Ct 1284, has

foreclosed an application of the Rickert and McCurdy Cases to the estate and inheritance tax situation. Among the properties involved in the Oklahoma Tax Commission Case were restricted cash and securities, which could not be freely alienated or used by the Indians without the approval of the Secretary of the Interior. We held that the restriction, without more, was not the equivalent of a congressional grant of estate tax immunity for the transfer of the cash and securities. Moreover, express repudiation was made of the concept that these restricted properties were federal instrumentalities and therefore constitutionally exempt from estate tax consequences. See also Helvering v. Mountain Producers Corp. 303 US 376, 82 L ed 907, 58 S Ct 623. The very foundation upon which the Rickert Case rested was thus held to be inapplicable.

We fail to see any substantial difference for estate tax purposes between restricted property and trust property. The power of Congress over both types of property is the same. Creek County v. Seber, 318 US 705, 717, 87 L ed 1094, 1103, 63 S Ct 920; United States v. Ramsey, 271 US 467, 471, 70 L ed 1039, 1041, 46 S Ct 559. Both devices have the common purpose of protecting those who have been found by Congress to be unable yet to assume a fully independent status relative to property. The effect which an estate or inheritance tax may have is the same in both instances; liens may be placed on both restricted and trust properties and lead to complications; and both types of property may of necessity be depleted to assure payment of the tax. The fact that the United States holds legal title as to trust property but not a to restricted property affords no distinguishing characteristic from the standpoint of an estate tax. In addition, Congress has given no indication whatever that trust properties in general are to be given any greater tax exemption than restricted properties. Hence the Oklahoma Tax Commission Case must control our disposition of this proceeding.

[APPENDIX]

Headnote 3

Implicit in this Court's refusal to apply the Rickert doctrine to an estate or inheritance tax situation is a recognition that such a tax rests upon a basis different from that underlying a property tax. An inheritance or estate tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. United States Trust Co. v. Helvering, 307 US 57, 60, 83 L ed 1104, 1107, 59 S Ct 692; Whitney v. State Tax Commission, 309 US 530, 538, 84 L ed 909, 913, 60 S Ct 635. In this case, for example, the decedent had a vested interest in his Osage headright; and he had the right to receive the annual income from the trust properties and to receive all the properties at the end of the trust period. At his death, these interests and rights passed to his heir. It is the tranfer of these incidents, rather than the trust properties themselves, that is the subject of the inheritance tax in question. In this setting, refinements of title are immaterial. Whether legal title to the properties is in the United States or in the decedent and his heir is of no consequence to the taxability of the transfer.

The result of permitting the imposition of the inheritance tax on the transfer of trust properties may be, as we have noted, to deplete the trust corpus and to create lien difficulties. But those are normal and intended consequences of the inheritance tax. And until Congress has in some affirmative way indicated that these burdens require that the transfer be immune from the inheritance tax liability, the Oklahoma Tax Commission Case permits that liability to be imposed. But that case also makes clear that should any of the properties transferred be exempted by Congress from direct taxation they cannot be included in the estate for inheritance tax purposes. No such properties are here involved, however.

We have considered the other points raised by the appellant but deem them to be without merit. The judgment below is therefore affirmed.

The Chief Justice, Mr. Justice Frankfurter and Mr. Justice Douglas dissent.